

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GARY B. FILLER and LAWRENCE PERLMAN,
Trustees of the TRA RIGHTS TRUST

Plaintiffs,

01 Civ. 9510 (MGC)

-against-

OPINION

HANVIT BANK, SHINHAN BANK, and
CHOHUNG BANK

Defendants.

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JANET BAKER and JAMES BAKER, JKBAKER
LLC and JMBAKER LLC,

Plaintiffs,

02 Civ. 8251 (MGC)

-against-

HANVIT BANK, SHINHAN BANK, and
CHOHUNG BANK

Defendants.

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CEDARBAUM, J.

Defendants move to dismiss the complaints in these two related actions under Fed. R. Civ. P. 12(b), Fed. R. Civ. P. 9(b) and on the ground of *forum non conveniens*. For the reasons that

follow, the motions to dismiss are granted.

Plaintiffs Filler and Perlman are trustees of the TRA Trust, the sole successor in interest to Seagate Technology, Inc. ("Seagate"). Seagate owned approximately \$170 million worth of shares in Dragon Systems, Inc. Plaintiffs Janet and James Baker, JKBaker LLC and JMBaker LLC ("the Bakers") collectively owned a majority of the shares of Dragon Systems, Inc. These actions arise out of the transfers by Seagate and the Bakers of their shares in Dragon Systems to Lernout & Hauspie Speech Products NV ("L&H Belgium"), in exchange for shares in L&H Belgium. Both transactions took place on June 7, 2000. Defendants are three Korean banks which plaintiffs allege engaged in a scheme to defraud investors in the shares of L&H Belgium by entering into sham agreements with L&H Belgium's Korean subsidiary, Lernout & Hauspie Korea ("L&H Korea"). L&H Belgium issues consolidated financial statements that incorporate financial data of its subsidiaries. The complaints allege that sham agreements between defendant banks and L&H Korea enabled L&H Belgium to issue consolidated financial statements containing falsely inflated revenue figures.

The Filler plaintiffs assert six claims: (1) securities fraud in violation of Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5; (2) racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18

U.S.C. § 1962(c); (3) conspiracy to engage in racketeering in violation of RICO, 18 U.S.C. § 1962(d); (4) common law fraud; (5) aiding and abetting common law fraud; and (6) conspiracy to defraud.

The Baker plaintiffs assert only state law claims: (1) common law fraud; (2) aiding and abetting common law fraud; (3) conspiracy to defraud; and (4) negligent misrepresentation.

On February 27, 2003 I granted the defendants' motion to dismiss the first amended complaint in the Filler action because the Filler plaintiffs failed to plead their claims with the particularity required by Fed. R. Civ. P. 9(b). The Filler plaintiffs have filed a second amended complaint.

Primary Fraud and RICO Claims

On a motion to dismiss, a federal court must accept as true all factual allegations of the complaint, and draw all reasonable inferences in favor of the plaintiffs. King v. Simpson, 189 F.3d 284, 287 (2d Cir. 1999). A complaint may be dismissed under Fed.R.Civ.P. 12(b)(6) "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Olkey v. Hyperion 1999 Term Trust, Inc., 98 F.3d 2, 5 (2d Cir. 1996) (internal quotes omitted).

In open court on June 26, 2003, I dismissed the Filler

plaintiffs' RICO and 10(b) claims. The 10(b) claims were dismissed because the Filler plaintiffs failed to identify a representation made to them by any defendant or a representation made to the them and attributed to any defendant. For the same reason, the Filler and Baker common law fraud claims are dismissed.

Although defendants assert that Korean law applies, the Filler plaintiffs assert that California law applies and the Baker plaintiffs assert that Massachusetts law applies, no party has argued that the laws of any of these jurisdictions differs from the law of New York with respect to the claims at issue. Furthermore, all of the parties have focused on New York law in their briefs.

In order to state a fraud claim under New York law, a plaintiff must allege: "(1) the defendant made a material false representation; (2) the defendant intended to defraud the plaintiff thereby; (3) the plaintiff reasonably relied upon the representation; and (4) the plaintiff suffered damage as a result of such reliance." Boule v. Hutton, 138 F.Supp.2d 491 (S.D.N.Y. 2001).

Like the Filler 10(b) claim, the Filler and Baker common law fraud claims fail because the complaints do not allege that any defendant bank made a representation to any plaintiff or that a representation was made to any plaintiff and attributed to any

defendant. Plaintiffs rely upon "false confirmations" made by defendants in Korea to L&H Belgium's auditors that certain loans to L&H Korea were without recourse, when in fact they were with recourse. However, it is not alleged that the auditors identified any defendant as the source of such information. The connection between plaintiffs' acquisition of stock in L&H Belgium and the representations by defendants to auditors in Korea is too attenuated to support a claim of common law fraud. Therefore the motions to dismiss the common law fraud claims are granted.

Aiding and Abetting Common Law Fraud and Conspiracy to Defraud

The essential elements of aiding and abetting fraud under New York law are: (1) the existence of a fraud; (2) a defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission. Wight v. Bankamerica Corp., 219 F.3d 79, 91 (2d Cir. 2000). "In alleging the requisite 'substantial assistance' by the aider and abettor, the complaint must allege that the acts of the aider and abettor proximately caused the harm to the [plaintiff] on which the primary liability is predicated." Bloor v. Carro, Spanbock, Londin, Rodman & Fass, 754 F.2d 57, 62 (2d Cir. 1985).

"Allegations of a 'but for' causal relationship are insufficient." Id. at 63. Aider and abettor liability will not

attach where the injury was not a direct or reasonably foreseeable result of the defendant's conduct. Id.

Conspiracy to defraud requires: "(1) an agreement among two or more parties, (2) a common objective, (3) acts in furtherance of the objective and (4) knowledge." Diamond State Ins. Co. v. Worldwide Weather Trading LLC, 2002 WL 31819217 (S.D.N.Y. 2002).

Rule 9(b) requires a party averring fraud or mistake to state with particularity "the circumstances constituting [the] fraud or mistake." Fed.R.Civ.P. 9(b). The "particularity requirement" contained in Rule 9(b) is substantial. Rich v. Maidstone Financial, Inc., 2002 WL 31867724, (S.D.N.Y. 2002).

"[A] complaint must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." Cosmas v. Hassett, 886 F.2d 8, 11 (2d Cir. 1989)); see also DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987) Additionally, when fraud is alleged against multiple defendants, a plaintiff must set forth separately the acts complained of as to each defendant. Rich, 2002 WL 31867724 at *10 (internal quotations omitted). To meet the pleading requirements of Rule 9(b), a complaint may not simply "clump[] defendants together in vague allegations." Id. (quoting In re Blech Securities Litigation,

928 F.Supp. 1279, 1294 (S.D.N.Y. 1996). Rule 9(b) also requires a plaintiff to adequately allege that the defendant's statements were the proximate cause of the plaintiff's injuries. Spencer Trask Software and Information Services LLC v. RPost Intern. Ltd., 2003 WL 169801, *21 (S.D.N.Y. 2003).

Plaintiffs' claims of aiding and abetting common law fraud and conspiracy to defraud are subject to the same pleading requirements under Rule 9(b) as their claims of common law fraud. See Spira v. Curtin, 2001 WL 611386, *4 (S.D.N.Y. 2001); Renner v. Chase Manhattan Bank, 2000 WL 781081, *5 (S.D.N.Y. 2000).

Both complaints fail to plead aiding and abetting common law fraud and conspiracy with the specificity required by Rule 9(b). First, the complaints do not make allegations with respect to each defendant, but instead refer only generally to the defendants as "the Banks" or "the Korean Banks." For example, the strongest allegations of aiding and abetting fraud in the Filler Complaint are as follows:

"The Korean Banks falsely confirmed the existence of phony receivables that L&H supposedly factored to the Korean Banks without recourse. Contrary to the Banks' lies to [the auditors], those funds were held by the Banks with recourse, in restricted time deposits, and in fact reverted to the Banks when L&H collapsed." Second Amended Filler Complaint, ¶ 5.

"The data below . . . reveals . . . certain transactions commencing in September 1999 that were the subject of false confirmations by the Korean Banks to [the auditors]. Those misrepresentations to [the auditors] were communicated by [the auditors] orally to

Seagate prior to execution of the Merger Agreement, and in L&H public statements, reviewed by [the auditors], both prior to execution of the Merger Agreement, and during the period between execution of the Merger Agreement and consummation of the Merger” Second Amended Filler Complaint, ¶ 39.

“Absent the Korean Banks’ deception . . . [the auditors] never would have approved the false financial figures contained and disseminated in L&H’s press releases of February 9, 2000 and May 9, 2000, and accompanying SEC filings.” Second Amended Filler Complaint, ¶ 5.

“The Korean Banks’ knowing participation in the fraud in Korea was essential to the success of the fraud that harmed the plaintiffs.” Id.

These allegations specify the “what,” but not the “who, where and when” required for Rule 9(b). Additionally, it is still impossible to decipher the connection between defendants’ agreements with L&H Korea, and the issuance of false financial statements by L&H Belgium. Rhetoric is not a substitute for specificity.

The complaints are full of conclusory allegations that the Korean entity acted through the Belgian parent. The complaints assume that these two corporations constitute a single entity. However, the complaints lack any explanation of why these distinct corporations should be regarded as one. It is impossible to tell from these complaints whether the Korean Banks intended to aid the Belgian company or to mislead it; and whether the Belgian company intended to mislead investors or was itself misled.

If the Korean subsidiary intentionally misrepresented its revenue to the Belgian company, these complaints might state actionable claims by L&H Belgium for aiding and abetting that fraud. But that is not the fraud sued on here and is not one of which the plaintiffs can complain.

The Baker complaint makes allegations substantially similar to the Filler complaint. Therefore, the motions to dismiss are granted as to aiding and abetting common law fraud and conspiracy. The Baker plaintiffs are given leave to amend to plead these claims with greater specificity, as are the Filler plaintiffs, for the second time.

Negligent Misrepresentation

_____The Baker plaintiffs also assert a claim of negligent misrepresentation. "Under New York law, the elements for a negligent misrepresentation claim are that (1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment." Hydro Investors, Inc. v. Trafalgar Power Inc., 227 F.3d 8, 20. The

defendant banks had no special relationship of trust with the plaintiffs. Moreover, as discussed in connection with plaintiffs' 10(b) and common law fraud claims, defendants made no representation to the Baker plaintiffs that could serve as the basis of a negligent misrepresentation claim. Therefore, the negligent misrepresentation claim is dismissed.

Conclusion

_____ The Filler and Baker common law fraud claims are dismissed, as is the Baker negligent misrepresentation claim. The Filler and Baker aiding and abetting common law fraud and conspiracy to defraud claims are also dismissed, with leave to replead only those claims with the requisite specificity. In view of this disposition, it is not necessary to reach the issue of *forum non conveniens*. See e.g. Marra v. Papandreou, 59 F.Supp.2d 65, 67 (D.D.C. 1999) (declining to reach issue of *forum non conveniens* because court granted summary judgment); Zeidenberg v. Polly Peck Int'l PLC, 1992 WL 178626, *4 (S.D.N.Y. 1992) (declining to reach issue of *forum non conveniens* because court granted motion to dismiss).

SO ORDERED.

Dated: New York, New York
September , 2003

MIRIAM GOLDMAN CEDARBAUM
United States District Judge